

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

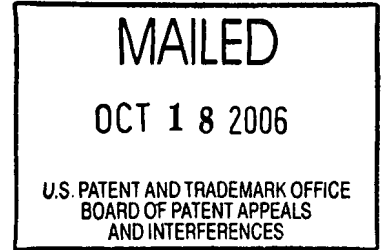
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Ex parte THOMAS DRURY

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Application No. 10/748,302

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ORDER RETURNING UNDOCKETED APPEAL TO EXAMINER

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This application was received electronically at the Board of Patent Appeals and Interferences on October 2, 2007. A review of the application has revealed that the application is not ready for docketing as an appeal. Accordingly, the application is herewith being returned to the examiner. The matter requiring attention prior to docketing is identified below.

**APPEAL BRIEF**

On December 22, 2006, appellants filed an Appeal Brief. A review of the file reveals that claim 7 in the appendix of the Appeal Brief is not consistent with the Amendment filed August 23, 2006. It is revealed that claim 7 is pending in the Amendment filed, August 23 and the Appendix of Claims in the Appeal Brief filed, December 22, 2006, canceled claim 7.

37 CFR 41.33 states:

Amendments and affidavits or other evidence after appeal.

(a) Amendments filed after the date of filing an appeal pursuant to § 41.31(a)(1) through (a)(3) and prior to the date a brief is filed pursuant to § 41.37 may be admitted as provided in § 1.116 of this title.

(b) Amendments filed on or after the date of filing a brief pursuant to § 41.37 may be admitted:

(1) To cancel claims, where such cancellation does not affect the scope of any other pending claim in the proceeding, or

(2) To rewrite dependent claims into independent form.

(c) All other amendments filed after the date of filing an appeal pursuant to § 41.31(a)(1) through (a)(3) will not be admitted except as permitted by §§ 41.39(b)(1), 41.50(a)(2)(i), 41.50(b)(1) and 41.50(c).

(d)(1) An affidavit or other evidence filed after the date of filing an appeal pursuant to § 41.31(a)(1) through (a)(3) and prior to the date of filing a brief pursuant to § 41.37 may be admitted if the examiner determines that the affidavit or other evidence overcomes all rejections under appeal and that a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented has been made.

(2) All other affidavits or other evidence filed after the date of filing an appeal pursuant to § 41.31(a)(1) through (a)(3) will not be admitted except as permitted by §§ 41.39(b)(1), 41.50(a)(2)(i) and 41.50(b)(1).

A new amendment must be submitted in a separate paper. Entry of a new amendment in an application on appeal is not a matter of right. The entry of an amendment (which may not include a new affidavit, declaration, exhibit or other evidence) submitted in an application on appeal is governed by 37 CFR 41.33, not 37 CFR 1.116.

Appropriate correction is required.

**ORDERED** that the application is returned to the Examiner:

- 1) hold the Appeal Brief filed December 22, 2006, defective;
- 2) notify the appellant to submit a "paper" which corrects the Claims Appendix;
- 3) notify appellant to file any amendment(s) in a separate paper;
- 4) acknowledge and consider any "paper" that may be submitted by Appellant in response to the Notice of Non-Compliance to correct the Appeal Brief as required by 37 CFR 41.33; and
- 5) for such further action as may be appropriate.

BOARD OF PATENT APPEALS  
AND INTERFERENCES

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